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Opinion No. 04-111

Constitutionality of a Specialty License Plate for DUI Offenders

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**QUESTION**

Is a law requiring a person convicted of DUI to have a special license plate indicating that the offender was convicted permissible under the state and federal constitutions?

**OPINION**

Yes, such a law is permissible if it is not deemed to be a punishment. If it is deemed to be a punishment, it will nevertheless be permissible if the penalty imposed comports with federal and state protections against cruel and unusual punishment, and if the penalty is applied prospectively.

**ANALYSIS**

1. Several provisions of both the federal and state constitutions will not be implicated if the legislation is not deemed to be a punishment.

Legislation requiring a person convicted of DUI to have a special license plate would implicate two provisions of the federal and state constitutions if the legislation in question is deemed a punishment. The federal provisions include the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Ex Post Facto Clause of Article I, § 10. The Tennessee Constitution has similar provisions in Article I, §§ 16 and 11, respectively.

The United States Supreme Court has employed a two-pronged analysis to determine whether legislation is a punishment for ex post facto purposes. *See Smith v. Doe*, 538 U.S. 84 (2003) (ex post facto); *see also Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (holding that the Tennessee Sex Offender Registry did not violate the Eighth Amendment after employing the two-pronged analysis to determine that requiring registration was not a punishment). Under this analysis, a court will first look to determine whether the legislature intended the legislation, either explicitly or impliedly, to be a punishment or, in the alternative, a civil penalty. *Doe*, 538 U.S. at 92. Factors that are relevant for determining the legislature's intent include whether the intent is expressed in the statute, the

presence of legislative findings in support of the expressed intent, the manner of the legislation's codification, and the enforcement procedures it establishes. *Doe*, 538 U.S. at 92-94.

If the legislature did indicate its intention to establish a civil penalty, the court will then determine whether the legislation is nevertheless so punitive in purpose or effect as to transform the civil penalty into one that is criminal. *Doe*, 538 U.S. at 92. Factors relevant to this prong of the analysis include:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

*Doe*, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

Application of this analysis in the context of the question presented here would require an examination of the substantive text of the proposed legislation. Without any actual text, it is not possible to predict whether a court would consider a provision requiring DUI offenders to have a special license plate to be a punishment or not.

2. If the legislation is deemed to be a punishment, it must comport with the Eighth Amendment and Article I, § 16 of the Tennessee Constitution

The Eighth Amendment, as applied against the states by the Fourteenth Amendment, prohibits a state from inflicting "cruel and unusual punishments." U.S. Const. amend VIII. The language of Article I, § 16, of the Tennessee Constitution is almost identical to that of the Eighth Amendment, but the Tennessee Supreme Court has read Art. I, §16, with a more "expansive interpretation." *State v. Harris*, 844 S.W.2d 601, 603 (Tenn. 1992).

For purposes of determining whether a legislatively approved punishment is cruel and unusual under the Tennessee Constitution, the Tennessee Supreme Court has adopted the test applied by the United States Supreme Court for Eighth Amendment analysis. *State v. Black*, 815 S.W.2d 166 (Tenn. 1991) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Under *Black*, three inquiries are required: "First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective." *Id.* at 189 (citation omitted).

No court in Tennessee has addressed whether such legislation would comport with the prohibition against cruel and unusual punishment. A survey of other states reveals that only a handful of states have instituted similar measures. None of these measures have been struck down on Eighth Amendment grounds, and a common thread among all of them is a durational limitation on the punishment. For example, two states have enacted legislation that would require a defendant to obtain a special license plate after being convicted of a DUI. Both Minnesota and Ohio impound the license plates of DUI offenders and require the offenders to apply for a specialty license plate in order to operate their vehicle under limited licenses. *See* Minn. Stat. § 168.041; Ohio Rev. Code Ann. § 4503.231. Minnesota requires the offender to have a specialty plate until the offender's license is reinstated or reissued. Minn. Stat. § 168.041(6). Ohio requires offenders to register for such a plate during the period of time that their licenses are suspended. Ohio Rev. Code Ann. § § 4510.021; 4503.231. Neither require that the license plate specifically identify the person as a DUI offender.

Other states have upheld court-imposed probation conditions requiring probationers to identify themselves as DUI offenders. The Georgia Court of Appeals has upheld a condition of probation requiring the defendant to wear a bracelet imprinted with the words "D.U.I. CONVICT" during his probationary period until further order of the judge. *Ballenger v. State*, 436 S.E.2d 793 (Ga. Ct. App. 1993). In *Goldschmitt v. State*, 490 So.2d 123 (Fla. Dist. Ct. App. 1986), the Florida Court of Appeals upheld a probation condition that required the defendant to place a bumper sticker reading "CONVICTED D.U.I.-RESTRICTED LICENSE" on his car. It should be noted, though, that Tennessee has previously rejected certain court-imposed conditions of probation involving the forced public disclosure of convictions because such conditions are not authorized in the Sentencing Act. *See State v. Burdin*, 924 S.W.2d 82, 87 (Tenn. 1996) (holding that a condition requiring a probationer to erect a sign in his front yard announcing that he is a sex offender was neither expressly nor implicitly authorized by the statutes governing a trial court's authority to impose conditions on probation); *State v. William M. Fahr*, No. W2000-00973-CCA-R3-CD, 2001 WL 490738, at \*2-3 (Tenn. Crim. App. 2001) (holding that a condition of probation requiring the defendant to make public confession in church that he had improper sexual contact with an eleven-year old girl was not authorized by the Sentencing Act).

3. The legislation would not violate the Ex Post Facto Clause if it is applied prospectively

Both the Tennessee and United States Constitutions prohibit the enactment of ex post facto laws. U.S. Const. art. I, § 10, cl.1; Tenn. Const., art. I, § 11. Laws that violate the Ex Post Facto Clauses of the Federal and Tennessee Constitutions have two characteristics. First, they must be truly retroactive; that is, they must apply to events occurring before their enactment. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *State v. Ricci*, 914 S.W.2d 475, 480 (Tenn. 1996). A statute is retroactive in the ex post facto sense if it changes the legal consequences of acts completed before its effective date. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Utiley v. Tenn. Dept. of Corr.*, 118 S.W.3d 705, 716 (Tenn. Ct. App. 2003). Second, they must disadvantage the affected person either by altering the

definition of criminal conduct or by increasing the punishment for the criminal conduct. *Lynce*, 519 U.S. at 441; *State v. Pearson*, 858 S.W.2d 879, 882 (Tenn. 1993). The heart of both Ex Post Facto Clauses bars the application of laws, rules, or policies that change the punishment and inflict greater punishment than the law annexed to the crime when it was committed. *Johnson v. United States*, 529 U.S. 694, 699 (2000). The analysis focuses on whether a statute, rule, or policy retroactively increases the punishment beyond what was prescribed when the underlying crime was committed. *Miller v. Florida*, 482 U.S. 423, 430 (1987); *Pearson*, 858 S.W.2d at 883.

Therefore, if the legislation applied only to offenders who were convicted of DUI after the effective date of the legislation, there would be no violation of either Ex Post Facto clauses. Were the legislation to be effective against the offenders who were convicted of DUI prior to the passage of the legislation, however, the legislation would likely run afoul of both clauses.

4. The proposed legislation is a valid exercise of the State's police power

The ability to drive a motor vehicle on a public highway is not a fundamental right. *Goats v. State*, 364 S.W.2d 889, 891 (Tenn.1963); *Sullins v. Butler*, 135 S.W.2d 930, 932 (Tenn.1940). Rather, it is a revocable "privilege" that is granted upon compliance with statutory licensing procedures. See *Reitz v. Mealey*, 314 U.S. 33, 36 (1941), *overruled in part by Perez v. Campbell*, 402 U.S. 637 (1971); *Goats*, 364 S.W.2d at 891; *Sullins*, 135 S.W.2d at 932. State governments possess an inherent power, i.e., police power, to enact reasonable legislation for the health, safety, welfare, morals, or convenience of the public. See *Nashville, C & St. L. Ry. v. Walters*, 294 U.S. 405 (1935); *Estrin v. Moss*, 430 S.W.2d 345, 348 (Tenn.1968); *State v. Sowder*, 826 S.W.2d 924, 927 (Tenn. Crim. App. 1991). Thus, the legislature, through its police power, may prescribe conditions under which the "privilege" of operating automobiles on public highways may be exercised. *Sullins*, 135 S.W.2d at 932; *State v. Booher*, 978 S.W.2d 953, 956 (Tenn. Crim. App. 1997).

Still, any such regulation must be reasonable. *Booher*, 978 S.W.2d at 956. For the legislation to be deemed reasonable, the public benefits must outweigh the interference with private rights. *Id.* Courts applying the test will presume the legislation is reasonable and valid so that anyone challenging the law would have the burden of clearly showing how it violates the Constitution. *Id.* While no Tennessee court has addressed the issue, a court applying this balancing test would likely determine that the public benefits of the proposed legislation outweigh the interference with private rights.

5. The proposed legislation does not violate an offender's right to privacy under the Federal or State Constitutions

In *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977), the Supreme Court recognized that it had acknowledged a constitutionally protected "zone of privacy" in at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters. *Id.* at 599. The Tennessee Supreme Court, recognizing that "the notion of individual liberty is . . . deeply embedded in the Tennessee Constitution," has concluded "that there is a right of individual privacy guaranteed

under and protected by the liberty clauses of the Tennessee Declaration of Rights.” *Id.* at 599-600.

Both courts have also held, however, that a person’s privacy interests fade when the information involved is already a matter of public record. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975); *Langford v. Vanderbilt Univ.*, 287 S.W.2d 32, 39 (1956). In Tennessee, a person’s criminal record is a public record, and it is available to any citizen who requests it. Tenn. Code Ann. § § 10-7-101, 10-7-507. Therefore, requiring a DUI offender to receive a special license plate would not involve the disclosure of personal matters. *See Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996) (“There is no violation of the United States Constitution in this case because there is no constitutional right to privacy in one’s criminal record. Nondisclosure of one’s criminal record is not one of those personal rights that is ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”) (citations omitted); *Cutshall v. Sundquist*, 193 F.3d 466, 482 (6th Cir. 1999) (holding that the Tennessee Constitution does not provide a right to the nondisclosure of private facts). Accordingly, legislation requiring a person convicted of DUI to receive a special license plate would not violate the offender’s right to privacy.

6. The legislation does not violate the Due Process Clause of the Fourteenth Amendment

“The Fourteenth Amendment prohibits state actors from depriving an individual of life, liberty, or property without the due process of law.” *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 140-41 (6th Cir. 1997). To implicate an offender’s due process rights, the legislation must interfere with one of the offender’s protected property or liberty interests. *Id.* The offender would have to point to a right conferred by either state law or the Constitution to establish a protected interest in freedom from public disclosure of the fact that the offender has been convicted of a DUI. *See Cutshall*, 193 F.3d at 478. The U.S. Supreme Court has made it clear that reputation alone is not a constitutionally protected liberty or property interest. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Only where the damage to reputation is coupled with some other interest is procedural due process protection triggered. *Cutshall*, 193 F.3d at 479. The Tennessee Supreme Court has never recognized an interest in freedom from public disclosure of a person’s criminal record. In fact, as noted above, such information is a public record. Therefore, the legislation does not implicate procedural due process protections.

7. The legislation does not violate the equal protection guarantees of the United States and Tennessee Constitutions

The Fourteenth Amendment to the United States Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV, § 1. The Equal Protection Clause has been construed as providing that “all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Unless the legislation being contested either intrudes upon a fundamental right or involves a suspect class, the legislation need only be rationally related to a legitimate government interest.

*Id.* at 432; *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). The Tennessee Supreme Court has held that the state constitutional guarantees of equal protection are co-extensive with the equal protection provisions of the Fifth and Fourteenth Amendments of the United States Constitution. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). As noted above, driving is a privilege and not a right. DUI offenders, furthermore, are not a suspect class. Therefore, the legislation would be subject to the review under the “rational basis” test. Under this test, the legislation would only be struck down if it is based on grounds totally unrelated to the pursuit of the State’s goal and only if no grounds can be conceived to justify it. *Clements v. Fashing*, 457 U.S. 957, 963 (1982).

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